UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Atlantic Coast Pipeline, LLC	**)**	**Docket No. CP15-554-000**

REQUEST FOR REHEARING OF THE NORTH CAROLINA UTILITIES COMMISSION

The North Carolina Utilities Commission ("NCUC"), an intervenor herein, pursuant to section 19(a) of the Natural Gas Act ("NGA")[1] and Rules 207 and 713 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission ("Commission" or "FERC"),[2] hereby requests rehearing of a two discrete issues in the Order Issuing Certificates[3] issued on October 13, 2017 in the above-referenced docket.

I. BACKGROUND

On September 18, 2015, Atlantic Coast Pipeline, LLC ("ACP") filed an application under section 7(c) of the NGA and Part 157 of the Commission's regulations requesting authorization to install, construct, own, operate and maintain certain natural gas pipeline facilities for its Atlantic Coast Pipeline Project consisting of the following: i) approximately 564.1 miles of various diameter pipeline; ii) three new compressor stations; and iii) various appurtenant and auxiliary facilities designed to transport up to approximately 1.5 million dekatherms per day ("MMDt/d") of natural gas.[4] Facilities to be constructed are located in West Virginia, Virginia, and North Carolina.

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1 15 U.S.C. § 717r(a) (2012).

2 18 C.F.R. §§ 385.207, 713 (2017).

3 *Atl. Coast Pipeline, LLC*, 161 FERC ¶ 61,042 (2017) ("Certificate Order").

4 ACP Application at 14-17.

ACP has executed precedent agreements for 96 percent of the newly-proposed capacity with the following shippers under negotiated rates: Duke Energy Progress, Inc., Duke Energy Carolinas, LLC, Piedmont Natural Gas Company, Inc., Virginia Power Services Energy Corp., Inc., Public Service Company of North Carolina, Inc., and Virginia Natural Gas, Inc.[5]

On October 23, 2015, the NCUC filed Comments in Support of Project and Protest of Proposed Recourse Rates ("NCUC Protest"). The NCUC's support of the Project was based on the facts that the ACP Project will provide i) 1.5 MMDth/d of new pipeline capacity from West Virginia to a point near Lumberton, North Carolina, with a lateral to Chesapeake, Virginia, ii) capacity to fuel growth and electric generation, iii) an interstate pipeline footprint along the I-95 corridor of North Carolina, and iv) new competition in the wholesale provision of natural gas in North Carolina.

Of relevance here, the NCUC protested ACP's use of a 14 percent return on equity ("ROE") to calculate its proposed recourse rates,[6] and the failure of the overstated recourse rates to provide the necessary check on the pipeline's market power at the time those contracts were entered into.[7]

The Commission issued its Certificate Order on October 13, 2017. In pertinent part, the Certificate Order accepted ACP's proposed 14 percent ROE over the NCUC's arguments that that ROE was unsupported as applied to ACP.[8] It also failed to address the NCUC's argument that, because FERC relies on the existence of just and reasonable

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5 ACP Application, Ex. I.

6 NCUC Protest at 5-7.

7 *Id.* at 3-4.

8 Certificate Order at P 102.

tariff rates to provide the necessary check on a pipeline's market power when entering into negotiated rate agreements, that check will not exist if the recourse rates are overstated during that negotiation process.

II. REQUEST FOR REHEARING

A. Specification of Errors

Pursuant to 18 C.F.R. § 385.713(c)(1), the NCUC respectfully submits that the Certificate Order contains the following errors:

1) It was error, and not the product of reasoned decision-making, for the Commission to approve ACP's proposed recourse rates, which used an unsupported and overstated 14 percent ROE.[9] The Commission's analysis improperly relied on prior cases where FERC allowed a 14 percent ROE for new entrant pipelines, without providing any analysis of a proper ROE for ACP based on the facts of this case. FERC's acceptance of the 14 percent ROE is inconsistent with (1) the Commission's obligations under the NGA; (2) court and Commission precedent recognizing the importance of using current market conditions to develop capital costs; and (3) any ROE approved for any pipeline after proper analysis in the past several years.

2) It was error, and not the product of reasoned decision-making, for the Commission to allow ACP to enter into negotiated rate agreements without ensuring at the time those negotiated rates were entered into that the market power of the pipeline was checked via recourse rates that are not overstated. The failure to ensure that the negotiated rates were not tainted by the exercise of market power by the pipeline is inconsistent with (1) the Commission's obligations under the NGA; (2) FERC's acknowledgment that the predicate for allowing a pipeline to charge a negotiated rate is that capacity is available at an appropriate recourse rate; and (3) court and Commission precedent recognizing the importance of using current market conditions to develop capital costs. The Commission's proposed remedy—to address rate of return and other cost of service elements after ACP files a cost and revenue study after three years of service,[10] ignores the excessive ROE granted to ACP in the instant proceeding that therefore fails to provide the needed check on ACP's market power during the time period when ACP and its shippers agreed to negotiated rates.

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[9] *See* NCUC Protest at 5 & n.16.

[10] Certificate Order at P 103.

B. Statement of Issues

Pursuant to 18 C.F.R. § 385.713(c)(2), the NCUC respectfully provides the following Statement of Issues:

1) Whether it was error, and not the product of reasoned decision-making, for the Commission to approve ACP's proposed recourse rates, which used an unsupported and overstated 14 percent ROE, without taking into account the significant changes in the financial markets which have occurred since it allowed new pipelines to use 14 percent to develop recourse rates, but rather merely relied on prior cases where FERC allowed equity returns of up to 14 percent to new entrants?[11]

2) Whether it was error, and not the product of reasoned decision-making, for the Commission to allow ACP to enter into negotiated rate agreements without ensuring that the market power of the pipeline was checked via recourse rates that are not overstated at the time the negotiated rate agreements were entered into?[12]

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[11] *See Motor Vehicle Mfrs. Ass'n of U.S., Inc., v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)); *FPC v. Hope Nat. Gas Co.*, 320 U.S. 591, 602 (1944); *Bluefield Waterworks & Improvement Co. v. Pub. Serv. Comm'n of W. Va.*, 262 U.S. 679, 693 (1923); *Emera Maine v. FERC*, 854 F.3d 9, 27-29 (D.C. Cir. 2017); *Canadian Ass'n of Petroleum Producers v. FERC*, 254 F.3d 289, 299 (D.C. Cir. 2001); *Cal. Gas Producers Ass'n v. FPC*, 421 F.2d 422, 428 (9th Cir. 1970); *Portland Nat. Gas Transmission Sys.*, 142 FERC ¶ 61,198 at P 233 (2013), *order on request for reh'g and refund report*, 150 FERC ¶ 61,106 (2015).

[12] *See Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43 (quoting *Burling Truck Lines*, 371 U.S. at 168); *Hope*, 320 U.S. at 602; *Bluefield*, 262 U.S. at 693; *Canadian Ass'n of Petroleum Producers*, 254 F.3d at 299; *Cal. Gas Producers Ass'n*, 421 F.2d at 428; *Natural Gas Pipelines Negotiated Rate Policies and Practices; Modification of Negotiated Rate Policy*, 104 FERC ¶ 61,134 at P 4 (2003), *order on reh'g and clarification*, 114 FERC ¶ 61,042, *dismissing reh'g and denying clarification*, 114 FERC ¶ 61,304 (2006) ("Negotiated Rate Policy Statement"); *Alternatives to Traditional Cost of Service Ratemaking for Natural Gas Pipelines*, 74 FERC ¶ 61,076, *reh'g denied*, 75 FERC ¶ 61,024 (1996), *petitions for review denied sub nom. Burlington Res. Oil & Gas Co. v. FERC*, 172 F.3d 918 (D.C. Cir. 1998) ("Alternative Rate Policy Statement"); *WestGas InterState Inc.*, 59 FERC ¶ 61,029 at p. 61,065 (1992).

III. ARGUMENT

The Commission's primary obligation under the NGA is to ensure that consumers do not pay excessive rates.[13] In the context of a certificate application under section 7 of the NGA, the Commission is obligated to make certain that the proposed Project is consistent with the public interest.[14] Below, the NCUC demonstrates that the Commission approved recourse rates for over $5.1 billion of investment, despite lacking the requisite substantial evidence to support a finding that ACP had complied with its statutory obligation to demonstrate that its proposal, including the proposed recourse rates, are required by the public convenience and necessity.

Specifically, the recourse rates contained in ACP's Application "are based on an overall pre-tax rate of return of 15.0 percent - - based on a capital structure of 50 percent equity and 50 percent debt, a rate of return on equity of 14 percent, and an estimated cost of debt of 6.8 percent."[15] As the NCUC explained in its Protest, the recourse rates proposed in ACP's Application show that ACP's first-year "Pre-tax Return" will be approximately three quarters of ACP's first-year cost of service underlying the proposed recourse rates."[16] Accordingly, the ROE chosen to compute the proposed recourse rates has a material impact on the level of ACP's recourse rates. In Section III.A below, the NCUC demonstrates that, despite that material impact, FERC accepted recourse rates that were computed with a 14 percent ROE that was not supported by the record.

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[13] *See, e.g., Cal. Gas Producers Ass'n*, 421 F.2d at 428.

[14] 15 U.S.C. § 717f(e).

[15] ACP Application at 30.

[16] *Id.*, Ex. P, at 3, lines 8 & 9 (showing a year-one pre-tax return of $757,667,447 out of a total cost of service of $957,625,105).

In this proceeding, ACP proposes to provide service under negotiated rates. FERC's policy is clear—it only allows negotiated rates if the pipeline's market power is checked by the availability of service at recourse rates.[17] Specifically, the Commission must ensure that the proposed recourse rates for the project are designed properly so that they provide the needed check on the pipeline's market power during the establishment of negotiated rates. In Section III.B below, the NCUC demonstrates that FERC's acceptance of negotiated rates, without any demonstration that recourse rates provide the needed check on the pipeline's market power, should be reversed on rehearing.

A. It Was Error, and Not the Product of Reasoned Decision-Making, for the Commission to Approve ACP's Proposed Recourse Rates, Which Used an Unsupported and Overstated 14 Percent ROE.

The only support ACP provided for its proposed 14 percent ROE is the statement that "[t]he proposed rate of return reflects the risk inherent in a new, major project venture like the ACP and is consistent with returns authorized for other new pipeline companies," which is supported by one footnote citing cases from 2010 to 2014.[18] In its Protest, the NCUC demonstrated that the cases cited in ACP's footnote do not provide any evidence, much less substantial evidence, that could be relied upon to support a finding that the proposed 14 percent ROE, and the resulting recourse rates, are required by the public convenience and necessity. Instead, those cases merely cite previous instances where the Commission allowed use of the 14 percent ROE to develop recourse rates, generally without discussion.

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[17] Negotiated Rate Policy Statement at P 4.

[18] ACP Application at 30 n.24.

In particular, footnote 16 of the NCUC's Protest explained that:

- In *Constitution Pipeline Co.*, the Commission approved Constitution's request for a 14 percent ROE without citation to any prior orders. *Constitution Pipeline Co., LLC*, 149 FERC ¶ 61,199 at PP 48-49 (2014). The underlying application in that proceeding did not provide any analysis of current financial conditions, but instead merely cited three prior orders from 2009 and 2010. *See Constitution Pipeline Co., LLC*, Docket No. CP13-499, June 13, 2013 Application at 9 (citing *Bison Pipeline LLC*, 131 FERC ¶ 61,013 [at P 24] (2010) (which in turn cites certificate applications from 2009); *Fayetteville Express Pipeline, LLC*, 129 FERC ¶ 61,235 (2009) and *Ruby Pipeline, LLC*, 128 FERC ¶ 61,224 (2009)).

- The second case relied upon by ACP, *Sierrita Gas Pipeline, LLC*, also approved a 14 percent ROE without any discussion. *Sierrita Gas Pipeline, LLC*, 147 FERC ¶ 61,192 at n.28 (2014). The underlying application in that proceeding cited only to 2008 and 2009 orders in support of the ROE request. *Sierrita Gas Pipeline, LLC*, Docket No. CP13-73 February 7, 2013 Application at 12-13 and n. 21 (citing 2008 and 2009 orders).

- Finally, ACP cites *Ruby Pipeline LLC*, 136 FERC ¶ 61,054 at ¶ 11 (2011) to support its ROE request. That order does not make any new finding, but rather simply cites the original Ruby certificate order, *Ruby Pipeline, LLC*, 128 FERC ¶ 61,224 at P 53 (2009), where FERC found Ruby's proposed 14 percent ROE to be reasonable, again relying solely on the 2009, 2008 and 2005 orders.

In approving the 14 percent ROE, FERC ignored the NCUC's demonstration that none of the proceedings cited by ACP, or any of the cases cited by those cases, contained any analysis that would support adoption of a 14 percent ROE for ACP. Instead, the cases cited by ACP merely cite earlier cases that also lack any analysis. As the courts have made clear, an agency's "failure to respond meaningfully to objections raised by a party renders its decision arbitrary and capricious."[19] Rather than acting in an arbitrary and capricious fashion, FERC should grant rehearing and address the fact that nothing in the cases relied on by ACP, or any of cases cited by those cases, provides an analysis which would support adopting a 14 percent ROE for ACP.

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[19] *Canadian Ass'n of Petroleum Producers*, 254 F.3d at 299.

Instead of fulfilling its obligation to analyze an appropriate ROE for ACP or explain how those prior cases support a 14 percent ROE for ACP, FERC continued its blind reliance on its earlier decisions. FERC also claims that it had allowed a 14 percent ROE in those prior cases for greenfield pipeline projects because greenfield pipelines undertaken by a new entrant in the market face higher business risks than existing pipelines proposing incremental expansion capacity.[20] This "analysis" suffers from three fatal flaws, each of which supports granting rehearing.

One, ACP's support for its proposed recourse rates in this certificate proceeding is based on the 14 percent ROEs provided to other new pipelines, which in turn relied on previous cases going back to 2005.[21] Putting aside the lack of any analysis in those prior cases, simply relying on ROE determinations made over a decade ago to justify an ROE determination made in 2017 is arbitrary and capricious and inconsistent with prior Commission precedent. Commission precedent recognizes the critical importance of basing an ROE on current market data, including market data during times of allegedly anomalous conditions.[22] As the Supreme Court has recognized, there is a sound basis for using current market data. Namely, a just and reasonable return will change as market conditions change.[23] Relying on returns developed in the early years of this century

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[20] Certificate Order at P 102 (citing Order No. 678 at P 127).

[21] *See* ACP Application at 30 n.24; NCUC Protest at 5 & n.16.

[22] *See, e.g.*, *Portland Nat. Gas Transmission Sys.*, 142 FERC ¶ 61,198 at P 233 (2013) (finding that "on balance . . . the use of the most recent data in the record consistent with long standing policy outweighed any adjustment to reflect purportedly anomalous results"), *order on request for reh'g and refund report*, 150 FERC ¶ 61,106 (2015).

[23] *See Bluefield*, 262 U.S. at 693 (holding that a return "may be reasonable at one time and become too high or too low by changes affecting opportunities for investment, the money market and business conditions generally").

simply does not comport with this precedent requiring use of current market data to establish capital costs. Accordingly, the Commission should grant rehearing on this issue.

Two, as the United States Court of Appeals for the D.C. Circuit recently explained, FERC's mere explanation that "it had done so 'in the past'" does not establish the necessary rational connection between the record evidence and FERC's decision.[24] FERC should grant rehearing and recognize that, since the only evidence ACP provided in support of its requested 14 percent ROE are citations to prior cases which have no supporting analysis other than citations to other prior cases which also lack any supporting analysis, there is no rational connection between the record evidence and FERC's decision to allow ACP to use a 14 percent ROE to establish its recourse rates.

Three, the Commission's reliance on Order No. 678 to support its holding approving a 14 percent ROE for ACP is misplaced and inadequate. Order No. 678 had nothing to do with establishing an appropriate ROE for any entity, much less for ACP. Rather, it involved rate regulation of certain natural gas *storage* facilities, in particular, the modification of FERC's market power analysis to permit the consideration of close substitutes to storage in defining the relevant product market and the adoption of regulations implementing section 312 of the Energy Policy Act of 2005 to authorize storage providers to charge market-based rates for service utilizing new capacity even when the storage providers cannot (or do not) demonstrate that they lack market power.[25]

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[24] *Emera Maine*, 854 F.3d at 27-29 (citing *Elec. Power Supply Ass'n v. FERC*, 136 S.Ct. 760, 782 (2016)).

[25] *Rate Regulation of Certain Natural Gas Storage Facilities*, 115 FERC ¶ 61,343 at P 1 (2006) ("Order No. 678").

Moreover, the cited language in Order No. 678[26] provides no analysis of the risk of any given new entrant, much less of ACP. Instead, the cited portion of Order No. 678 merely made generalizations[27] regarding unidentified potential future natural gas storage providers. While the NCUC recognizes that the courts have agreed that the rate review required under NGA section 7 is less rigorous than that required by the just and reasonable standard under section 4 of the NGA,[28] ACP still has the obligation to support each element of its certificate application with substantial evidence. Ten-year-old generalizations regarding the relative risk facing unidentified, potential storage providers should not be deemed to obviate ACP's statutory obligation to support its certificate application with substantial evidence.

Finally, especially given the inadequacy of its analysis based on Order No. 678 and the arbitrary and capricious nature of its failure to address the lack of any analysis in the cases cited by ACP, or in the cases cited by those cases, it was also error for the Commission to fail to address the NCUC's demonstration that a 14 percent ROE is materially higher than any ROE FERC has approved for any natural gas pipeline in the

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[26] Paragraph 127 of Order No. 678 reads in its entirety:

> We also agree with the NYPSC and Haddington that another factor to consider in determining whether market-based rates are in the public interest is whether the applicant is a new independent storage provider or an existing pipeline in the relevant market. In general, we believe that an existing pipeline will face fewer difficulties in securing financing for incremental expansions of existing storage facilities. As a going concern with existing customers and financial relationships, the risk associated with acquiring financing is lower for incremental expansions than the risk associated with a greenfield project undertaken by a new entrant in the market. Therefore, we believe it may be more difficult for an existing pipeline to meet the public interest standard than it will be for a new independent storage provider.

[27] "In general, we believe . . . ." Order No. 678 at P 127.

[28] *See* Certificate Order at P 101, n.148.

past several years.[29] Most telling is FERC's approval of a 14 percent ROE for ACP when compared to its decision in Opinion No. 524-A to allow Portland Natural Gas Transmission System *to use the top of the range of reasonableness*—11.59 percent—because it found that "a potential investor could reasonably reach the conclusion that Portland is the most risky of the comparable companies"[30] based on Portland's significant risk and having a credit rating below investment grade.[31] In stark contrast, ACP has entered into negotiated rate agreements for 96 percent of its available capacity and nothing in the financing information in Exhibit L of its application would support a finding that ACP will have a credit rating below investment grade. Given that FERC asserted that the 14 percent ROE for ACP was appropriate to reflect the business risks faced by new entrants in the market,[32] the Commission should have addressed the NCUC's argument that recent ROE decisions, including *Portland*, which involved an entity with a credit rating below investment grade and which FERC called "the most risky," call into question the reasonableness of allowing ACP to use a 14 percent ROE to establish its recourse rates.[33]

In light of these errors, FERC should grant rehearing and find that ACP has not supported using a 14 percent ROE to establish recourse rates.

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29 NCUC Protest at 7.

30 *Portland Nat. Gas Transmission Sys.*, 150 FERC ¶ 61,107 at P 231 (2015).

31 *Id.* at PP 207, 209.

32 Certificate Order at P 102.

33 In order to survive review under the "arbitrary and capricious" standard, the Commission must "examine the relevant data and articulate a satisfactory explanation for its actions, including a 'rational connection between the facts found and the choice made.'" *See Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43 (quoting *Burlington Truck Lines*, 371 U.S. at 168).

B. It Was Error, and Not the Product of Reasoned Decision-Making, for the Commission to Allow ACP to Enter into Negotiated Rate Agreements Without Ensuring That the Market Power of the Pipeline Was Checked via Recourse Rates That Are Not Overstated at the Time the Negotiated Rate Agreements Were Entered Into.

The NCUC protested ACP's proposal to enter into negotiated rates without any demonstration that its recourse rates provide the needed check on the pipeline's market power during the period it was entering into the negotiated rate agreements.[34] Despite its obligation to respond meaningfully to objections raised by a party[35] the Certificate Order contains no analysis of whether it was reasonable to allow ACP to enter into negotiated rate agreements without demonstrating that its proposed recourse rates provide the necessary check on the market power of the pipeline during the time it was entering into the negotiated rate agreements. That failure to respond renders the Commission's decision arbitrary and capricious such that rehearing should be granted.

As the NCUC explained in its Protest, the Commission permits pipelines to negotiate individualized rates[36] which, unlike discounted rates,[37] are not constrained by the maximum and minimum rates in the pipeline's tariff.[38] However, pipelines must permit shippers the option of paying the traditional cost of service recourse rates in their tariffs, instead of requiring them to negotiate rates for any particular service. The Commission relies on the availability of recourse rates to prevent pipelines from exercising market power by assuring that the customer can revert to the just and

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[34] NCUC Protest at 3-4.

[35] *Canadian Ass'n of Petroleum Producers*, 254 F.3d at 299.

[36] Alternative Rate Policy Statement; *see generally* Negotiated Rate Policy Statement.

[37] *See* 18 C.F.R. § 284.10(c)(5).

[38] *See N. Nat. Gas Co.*, 105 FERC ¶ 61,299 at PP 12-17 (2003) (clarifying the distinction between discounted and negotiated rates).

reasonable tariff rate if the pipeline unilaterally demands excessive prices or withholds service.[39] Therefore, even if all service is being provided under negotiated rates, recourse rates need to be properly designed so that they provide a check on the pipeline's market power during the establishment of negotiated rates.[40]

In the Certificate Order, the Commission ignored the NCUC's argument that the predicate for permitting a pipeline to charge a negotiated rate is that capacity is available at the recourse rate. Given the Commission's previously stated concerns regarding "maintaining the integrity of recourse service,"[41] it was not reasoned decision-making to allow ACP to calculate its recourse rate using an unsupported, excessive ROE. Allowing ACP to base its recourse rates on an ROE of 14 percent does not maintain the integrity of recourse rates and, accordingly, FERC's approval of the recourse rates is arbitrary and capricious. Rehearing is therefore appropriate.

1. The Commission's Rationale That It Would Be Too Difficult and Time Consuming to Ensure Appropriate Recourse Rates in Section 7 Proceedings Is an Abdication of the Commission's Obligations Under the NGA and Does Nothing To Mitigate the Pipeline's Market Power During the Period That Matters Most—When It Was Entering Into the Negotiated Rate Agreements.

In support of it opposition to ACP's proposed 14 percent ROE, the NCUC demonstrated that ACP had not provided any support for its requested ROE other than relying on a prior order that cites to other prior orders that also lack analysis.[42] The NCUC also demonstrated that the 14 percent ROE is excessive given recent Commission

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[39] Negotiated Rate Policy Statement at P 4.

[40] NCUC Protest at 4 (citing Negotiated Rate Policy Statement at pp. 61,238-42).

[41] Alternative Rate Policy Statement at p. 61,240.

[42] NCUC Protest at 5 & n.16.

pronouncements on pipeline ROEs of 10.28 percent, 10.55 percent, and 11.55 percent.[43] The Certificate Order found that "conducting DCF analyses in individual certificate proceedings would [not] be the most effective or efficient way for determining the appropriate ROEs for proposed pipeline expansions."[44] The Commission explained that it would difficult to complete a section 4-type analysis of return in section 7 cases in a timely manner and that doing so would unnecessarily delay proposed projects with time sensitive in-service schedules.[45] This finding ignores the fact that, in the past, the Commission has looked to discounted cash flow ("DCF") analyses to inform its rate of return findings in certificate proceedings[46] or could perform other analyses based on current market data. Furthermore, the crux of this argument—that it would be too difficult or time consuming to ensure appropriate recourse rates in section 7 proceedings—is an abdication of the Commission's obligation under the NGA to protect consumers from excessive rates.[47]

FERC satisfies its consumer protection obligation by maintaining the integrity of recourse rates in certificate proceedings. If the recourse rates are not properly designed, they fail to provide the necessary check on the pipeline's market power at the time it matters most: when the pipeline is entering into negotiated rate agreements. The NCUC

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[43] *Id.* at 5-7.

[44] Certificate Order at P 101.

[45] *Id.*

[46] *See, e.g., WestGas InterState Inc.*, 59 FERC ¶ 61,029 at p. 61,065 (1992) (considering, among other factors, the results of a DCF analysis to find that the pipeline's requested 15 percent ROE should be reduced to 12.50 percent).

[47] *See, e.g., Cal. Gas Producers Ass'n*, 421 F.2d at 428.

explicitly raised this issue, but the Certificate Order does not address it. That was clear error.

Merely accepting an unsupported, excessive 14 percent ROE when current economic conditions clearly demonstrate the excessive nature of that major portion of the cost of service underlying ACP's proposed recourse rates, runs counter to precedent. FERC's ratemaking function involves "pragmatic adjustments," the end result being the most important.[48] The end result here—allowing ACP to base its recourse rates on a 14 percent ROE on billions of dollars of investment[49]—is the epitome of arbitrary and capricious decision-making. Given that ratepayer protection is the Commission's primary obligation under the NGA,[50] rehearing is warranted in this case to correct the error of allowing ACP to develop excessive recourse rates.

In order to justify its decision of allowing recourse rates to be developed using an excessive return, the Commission cites a 1959 decision explaining that it is an appropriate exercise of discretion in section 7 proceedings to approve initial rates that will "hold the line" until just and reasonable rates are adjudicated under section 4 or 5 of the NGA.[51] This purported solution does nothing to ensure that the recourse rates in this proceeding are not excessive. To begin, negotiated rates did not exist in 1959 at the time of this decision. This change in circumstance renders this decision inapposite.

The Commission also relies on the fact that ACP is required to file a cost and revenue study at the end of its first three years of operation to justify its existing cost-

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48 *Hope*, 320 U.S. at 602.

49 "ACP estimates that the proposed facilities will cost $5,071,226,515." Certificate Order at P 8.

50 *Atl. Ref. Co. v. Pub. Serv. Comm'n of N.Y.*, 360 U.S. 378, 388 (1959).

51 Certificate Order at P 101 n. 148 (citing *Atl. Ref. Co.*, 360 U.S.).

based rates.[52] While it is true that parties may challenge the issue of return in that future proceeding, ACP's recourse rates will remain excessive until that future date. Thus, "holding the line" until the next section 4 or 5 proceeding is deficient because any section 4 filing will go into effect after the rate is filed. Furthermore, unless the initial recourse rates filed with a certificate application are based on a reasonable estimate of the pipeline's actual costs, they will not achieve their purpose—to provide a check on the pipeline's market power when the pipeline is entering into the negotiated rates as required by the Commission's Negotiated Rate Policy. Making parties wait to raise this issue in a review that will not begin until after construction and three years of operation of the new facilities will not address the time frame that actually matters (*i.e.*, the period during which the parties agreed to the negotiated rates).[53] Nor will the negotiated rates be at issue in the next rate case—those negotiated rates are set for the term of the contract. Accordingly, the NCUC requests that the Commission grant rehearing to correct this error.

IV. CONCLUSION

WHEREFORE, the North Carolina Utilities Commission respectfully requests that the Federal Energy Regulatory Commission grant rehearing of the afore-mentioned findings in its Certificate Order.

Date: November 13, 2017

Respectfully Submitted,

The North Carolina
Utilities Commission:

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[52] *Id.* at P 103.

[53] *See* Negotiated Rate Policy Statement at P 4.

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CERTIFICATE OF SERVICE

Pursuant to Rule 2010 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.2010 (2017), I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, DC, this 13th day of November, 2017.

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